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No. 88-389

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

PUBLIC EMPLOYEES RETIREMENT SYSTEM OF OHIO,
Appellant,

v.

JUNE M. BETTS,
Appellee.

On Appeal from the United States Court of Appeals for the Sixth Circuit

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BRIEF FOR THE NATIONAL PUBLIC EMPLOYERS LABOR RELATIONS ASSOCIATION AS AMICUS CURIAE SUPPORTING APPELLANT

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QUESTION PRESENTED

Whether a retirement program's denial of disability retirement benefits to employees age 60 and over (and provision instead of only early or regular retirement benefits) must be justified by age-related cost factors in order to qualify for protection under the "bona fide employee benefit plan" exemption of § 4(f)(2) of the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 623(f)(2).

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BRIEF FOR THE NATIONAL PUBLIC EMPLOYERS LABOR RELATIONS ASSOCIATION AS AMICUS CURIAE SUPPORTING APPELLANT

INTEREST OF THE AMICUS[1]

The National Public Employers Labor Relations Association ("NPELRA"), a non-profit association organized under the laws of Illinois, represents 2,300 labor relations and personnel professionals who work on behalf of states, counties, cities, and special governmental districts throughout the United States. Many of these governmental entities maintain, and many of NPELRA's members are involved in administering, regular and early retirement plans, disability retirement plans, and other

[1] Counsel for both parties have consented to the filing of this amicus brief. Their consents have been filed with the Clerk of this Court.

types of employee benefit plans. Some of these benefit plans are negotiated with representatives of employee groups; others are created by state and/or local law and regulation. Thus, the resolution of the issue presented in this case—involving whether a retirement program's denial of disability retirement benefits (but not early or regular retirement benefits) to employees age 60 and over must be justified by age-related cost factors to qualify for protection under § 4(f)(2) of the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. § 623(f)(2)—is of significant interest to NPELRA and its members.

STATEMENT

1. The Public Employees Retirement System of Ohio ("PERS") entitles public employees who satisfy certain eligibility conditions to receive monthly retirement benefits upon the termination of their employment. J.S. App. A3, A9. A regular retirement pension is available to any employee who has attained the age of 70; an early retirement pension is available to any employee who is age 60 or over and has five or more years of service. J.S. App. A31-A32. A disability pension is available to any employee who has at least five years of credited service and has become physically unable to perform the requirements of her job. J.S. App. A3, A9. An employee is ineligible for the disability pension, however, if she is age 60 or over, or is receiving another disability retirement benefit from any Ohio state or municipal program. J.S. App. A9. The statutory age limitation on receipt of disability retirement benefits under PERS has existed since 1933. J.S. App. A3. In 1976, Ohio amended the statute to provide that the disability pension would equal or exceed 30% of an employee's final average salary. J.S. App. A24.

2. In June 1985, June Betts, a 61-year-old employee of the Hamilton County Board of Mental Retardation and Developmental Disabilities ("HCBMRDD"), became disabled and could no longer perform work-related duties. J.S. App. A21, A23. HCBMRDD advised Betts that, unless she elected regular retirement, it would be forced to place her on unpaid medical leave. J.S. App. A23. Betts applied to PERS for the more valuable disability retirement benefits,[2] but PERS told her that she was ineligible for those benefits because of her age. *Ibid.* Betts then elected both to receive early retirement benefits (plus health benefits) and to file suit under the ADEA, claiming that the State had compelled her to retire by denying her disability retirement benefits. *Ibid.*

3. On cross-motions for summary judgment, the district court held for Betts. J.S. App. A20-A34. Although it agreed that the plan was "eminently just" since it provided benefits to persons who would "otherwise have no source of income during their disability," it found that the plan discriminated against older workers on the basis of age. J.S. App. A25-A26. Moreover, it rejected PERS' argument that the "bona fide employee benefit plan" exemption in § 4(f)(2) of the ADEA, 29 U.S.C. § 623(f)(2), protected the disability retirement provision, finding that the age limitation on eligibility for disability retirement benefits was not justified by significant age-related cost considerations and, therefore, that the program was not the "type of plan" contemplated in the exemption. J.S. App. A29. The court went on to hold that, by limiting Betts to a choice between regular retirement and unpaid medical leave, HCBMRDD and PERS had constructively discharged, and thus involuntarily retired, her in violation of § 4(f)(2)'s express prohibition. J.S. App. A30.

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[2] Because it had to equal at least 30% of Betts' final average salary, the disability retirement benefit for Betts would have equalled $355.02 per month. The early retirement benefit, which included no minimum benefit guarantee, equalled only $158.50 per month. J.S. App. A24.

4. A divided panel of the Sixth Circuit affirmed. J.S. App. A2-A19. It began by noting that, under § 4 (a)(1) of the ADEA, 29 U.S.C. § 623(a)(1), an employer "may not use age as a basis on which to discriminate against an employee in the compensation, terms, conditions, or privileges of employment." *Id.* at A4. It further noted that, "[w]hen there is direct evidence that a benefit plan discriminates on the basis of age, the plan is unlawful unless it falls within the bona fide employee benefit plan exception of 29 U.S.C. § 623(f)(2)" and that, in amending this exception in 1978, "Congress expressly repudiated [this] Court's decision and reasoning in *United Airlines v. McMann*, 434 U.S. 192 (1977), which held that a bona fide benefit plan that treated older employees differently and predated the Act need not be justified by any business purpose." J.S. App. A4. The court then concluded that, "[i]n light of this legislative intent," it had to "agree" with the district court that "'the critical factor in [the] determination of whether defendants' plan is the type of plan exempted is whether it is based upon age-related cost factors'" (*ibid.* (citation omitted)).

Citing federal regulations and two courts of appeals' decisions, the court explained that, "[u]nder the Act, an age-based benefit plan which denies disability retirement to older employees in favor of forcing length of service retirement is unlawful unless it can be justified by a substantial business purpose." J.S. App. A5. The court then found that the plan could not be justified by any such business purpose, because, "[d]espite having every opportunity, the defendants declined to introduce any cost figures or other economic justification." J.S. App. A6. Thus, without addressing the district court's constructive discharge and involuntary retirement findings, the court affirmed.

SUMMARY OF ARGUMENT

The court below held that, in order to qualify for the exemption of § 4(f)(2) of the ADEA, an age-based variance in employee benefits must be justified by age-related cost considerations. This age-related cost justification limitation on § 4(f)(2) cannot be squared with the language or legislative history of the statute.

The language of § 4(f)(2) indicates that Congress intended the exemption to cover the gamut of employer-sponsored fringe benefit programs. In terms of ordinary English usage, industrial practice, and legislation in existence at the time of enactment, the phrase "any bona fide employee benefit plan" plainly refers to any and all ongoing administrative programs for the provision of non-wage and non-salary compensation. The "such as" phrase that modifies the phrase "any bona fide employee benefit plan" merely provides examples of such employee benefit plans. The "subterfuge" phrase that modifies the phrase "any bona fide employee benefit plan" requires inquiry into the employer's subjective intent, and thus cannot be the statutory touchstone for an objective, age-related cost justification limitation on § 4(f)(2).

The legislative history confirms this understanding of the statutory language. It shows that Senator Javits proposed the enacted language both because he believed that a broad exemption was necessary to encourage the hiring of older workers and because he believed that regulation of employee benefit plans was a complicated subject meriting an entirely distinct and comprehensive statutory scheme. Indeed, he brought to his colleagues' attention the fact that he had recently introduced a bill to create such a distinct and comprehensive statutory scheme, and this bill defined the phrase "employee benefit plan" to encompass the gamut of employer-sponsored fringe benefit plans. The legislative history further indicates that Congress understood the meaning, purpose, and

intended breadth of Senator Javits' proposal, and that, on this understanding, Congress chose to enact Senator Javits' proposal, rather than the express age-related cost justification limitation proposal of Senator Smathers, or the case-by-case "arbitrariness" approach of the Johnson Administration.

ARGUMENT

AN AGE-BASED VARIANCE IN EMPLOYEE BENEFITS NEED NOT BE JUSTIFIED BY AGE-RELATED COST FACTORS IN ORDER TO QUALIFY FOR PROTECTION UNDER THE "BONA FIDE EMPLOYEE BENEFIT PLAN" EXEMPTION OF § 4(f)(2) OF THE ADEA

Section 4(a)(1) of the ADEA makes it unlawful for an employer to "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623(a)(1). Section 4(f)(2) of the statute, however, qualifies § 4(a)(1)'s prohibition, by providing that it shall not be unlawful for an employer:

> to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire any individual, and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title because of the age of such individual[.]

29 U.S.C. § 623(f)(2). The court below held that, in order to qualify for § 4(f)(2)'s protection, an age-based variance in employee benefits must be justified by age-related cost considerations. In so holding, it is unclear whether the court ruled (as the district court ruled) that § 4(f)(2) applies only to those types of "plans" where the cost of providing a benefit varies according to age, or whether it ruled (as the federal regulations and the

court of appeals' decisions it cites ruled) that an age-based differential in benefits is a "subterfuge" to evade the purposes of the ADEA unless the differentiation is specifically attributable to age-related costs. In either event, the court below was wrong: an age-related cost justification limitation on § 4(f)(2) cannot be squared with the language, legislative history, or purposes of § 4(f)(2).

A. An Age-Related Cost Justification Limitation Cannot Be Derived From Or Reconciled With The Statutory Language

This Court has long held that, "unless otherwise defined, words [used in a statute] will be interpreted as taking their ordinary, contemporary, common meaning." *Perrin v. United States*, 444 U.S. 37, 42 (1979). *See also Burns v. Alcala*, 420 U.S. 575, 580-581 (1975). On that view, § 4(f)(2) must apply to all ongoing administrative programs for the provision of non-wage compensation—including those without age-related cost justifications (such as disability retirement, severance pay, sick leave, unemployment compensation, and retirement incentive plans)—that were not conceived to accomplish discrimination in terms or conditions of employment or in compensation not conferred through employee benefit plans.

1. On its face, § 4(f)(2) applies to "any bona fide employee benefit plan." 29 U.S.C. § 623(f)(2). The term "any" signifies that Congress intended the exemption to be comprehensive in scope. *See, e.g., Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 588-89 (1980); *Shea v. Vialpando*, 416 U.S. 251, 260 (1974). The phrase "bona fide" simply means that a plan must be authentic—that is, it must "'exist[] and pay[] benefits.'" *United Air Lines, Inc. v. McMann*, 434 U.S. 192, 194 (1977) (citation omitted). The phrase "employee benefit" refers to "virtually any form of compensation provided: (1) in a form other than direct wages; and (2) paid for in whole or in part by the employer"—i.e., to any "fringe

benefit." *Fundamentals of Employee Benefit Programs* 2 (Employee Benefit Research Institute, 3d ed. 1987); *see also Websters II Riverside University Dictionary* 115 (1984). Finally, the term "plan" refers to any "detailed scheme, program, or method worked out beforehand for the accomplishment of an object." *Id.* at 898; *see also Fort Halifax Packing Co. v. Coyne*, 107 S. Ct. 2211, 2217-219 (1987) (defining term "plan" in Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001 *et seq.*). Thus, when viewed in terms of its ordinary English meaning, the language of § 4(f)(2) exempts every ongoing administrative program that provides non-wage compensation to employees and that is not a "subterfuge" to evade the purposes of the ADEA.

The conclusion that Congress intended § 4(f)(2) to have this broad coverage is bolstered by the meaning given to the phrase "employee benefit plan" in the industrial relations practice that pre-existed the ADEA's enactment in 1967 and that continues to exist today. *Cf. California Brewers Ass'n v. Bryant*, 444 U.S. 598, 604 (1980) (interpreting the term "seniority system" in Title VII by reference to industrial relations practice and national labor policy). In that practice, the phrase "employee benefit plan" was and is understood to refer to, among other things, credit union plans, short- and long-term disability benefit plans, disability retirement plans, home financing plans, insurance plans, disability insurance plans, pensions plans, profit-sharing plans, savings plans, scholarship plans, stock purchase plans, termination incentive and severance allowance plans, and certain vacation, sick leave, and holiday benefit plans. *See The Total Approach to Employee Benefits* 83-124, 506 (A. Deric ed. 1967); M. Greene, *The Role of Employee Benefit Structures in Manufacturing Industry* 13, 20-23, 103-110 (1964); M. Wermel & G. Beideman, *Employee Benefit Programs* 1-4, 17-19, 23-31 (1957); *Successful Employee Benefit Plans* 74-91 (Prentice-Hall, Inc. ed. 1952). Nothing in the statutory language suggests that Congress intended in any way to depart from this broad understanding of the phrase "employee benefit plan." *Accord* 29 C.F.R. § 1625.10(2)(b) ("[a]n 'employee benefit plan' is a plan, such as a retirement, pension, or insurance plan, which provides employees with what are frequently referred to as 'fringe benefits.'").

That Congress modified the phrase "any bona fide employee benefit plan" with the phrase "such as a retirement, pension, or insurance plan" does not, as some courts have suggested, provide support for an age-related cost justification limitation on § 4(f)(2)'s plain meaning. *See, e.g., EEOC v. Westinghouse Elec. Corp.*, 725 F.2d 211, 224 (3d Cir. 1983), *cert. denied*, 469 U.S. 820 (1984). For one thing, at the time the statute was first adopted, many retirement, pension, or insurance plans—such as defined contribution pension plans, profit-sharing retirement plans, and many disability retirement plans—did and still do not have age-related cost justifications; thus, the age-related cost-justification limitation cannot be derived from the "types" of plans listed in the "such as" phrase. *Accord Alford v. City of Lubbock*, 664 F.2d 1263 (5th Cir.), *cert. denied*, 456 U.S. 975 (1982) (defined contribution pension plan); *Brennan v. Taft Broadcasting Co.*, 500 F.2d 212 (5th Cir. 1974) (profit-sharing retirement plan). Second, the "such as" phrase merely provides examples of the plans included in the phrase "any bona fide employee benefit plan." It does not purport to define or qualify that phrase, as an age-related cost justification limitation would do. *See id.* at 215; *see generally Donovan v. Anheuser-Busch, Inc.*, 666 F.2d 315, 327 (8th Cir. 1981). Finally, the "such as" phrase purports only to illustrate the kinds of *plans* that § 4(f)(2) covers, and the concept of a "plan" does not in any conceivable sense relate to the variables affecting the cost of providing particular *benefits*. *See Brennan v. Taft Broadcasting Co.*, 500 F.2d at 216-217; *see generally Fort Halifax Packing Co. v. Coyne*, 107 S. Ct. at 2217-

219 (distinction between statutory terms "plan" and "benefits" is significant).

Nor can § 4(a)(1)'s prohibition on age discrimination in employee "compensation" provide the necessary touchstone for an age-related cost limitation on § 4(f)(2) or, for that matter, for any other restriction on § 4(f)(2). Section 4(f)(2) is a limitation on § 4(a)(1), not *vice versa*. Because of § 4(f)(2), § 4(a)(1)'s prohibition only applies to employee "compensation" that is not conferred through an employee benefit plan. Thus, while § 4(a)(1) applies to age discrimination in employee "payroll practices" (*see Alford v. City of Lubbock*, 664 F.2d at 1272 & n.11), and to age discrimination in benefits that do not require the maintenance of an ongoing administrative program—i.e., a "plan" (*see EEOC v. Borden's, Inc.*, 724 F.2d 1390, 1396 (9th Cir. 1984)), it does not, because of § 4(f)(2), generally apply to age discrimination in ongoing administrative programs that provide non-wage, non-salary compensation.

Significantly, the distinction between employee "compensation"—covered by § 4(a)(1)—and employee compensation conferred through "employee benefit plans"—protected by § 4(f)(2)—is well established in law as well as in industrial relations practice. In particular, ERISA regulates only employee compensation conferred through "employee benefit plans." ERISA defines the phrase "employee benefit plan" to have the broad meaning that was and is today well-established in industrial relations practice.[3] Consistent with the traditional view of that phrase,

[3] ERISA defines the phrase "employee benefit plan" to encompass both "employee pension benefit plan[s]" and "employee welfare benefit plan[s]." 29 U.S.C. § 1002(3). The phrase "employee pension benefit plan" is defined as any plan that:

> (i) provides retirement income to employees, or
>
> (ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond[.]

[Continued]

the Department of Labor ("DOL") has found that ERISA does not regulate employer "payroll practices." *See* 29 C.F.R. § 2510.3-1 (excluding from definition of "employee benefit plan" such items of compensation as: payment for work performed, including overtime pay, shift premiums, holiday premiums, and weekend premiums; payment out of the employer's general assets for time not worked, such as for medical reasons, or while on vacation, military duty, jury duty, training, or sabbatical; an on-premises facility for dining, such as a cafeteria, or a first aid room; holiday gifts; and special sales to employees). And this Court has made clear that the statutory phrase "employee benefit plan" does not encompass benefits where their provision does not require the maintenance of ongoing administrative programs—i.e., programs for determining the eligibility of claimants, calculating benefit levels, making disbursements, monitoring the availability of funds for benefit payments, and keeping appropriate records. *See Fort Halifax Packing Co. v. Coyne*, 107 S. Ct. at 2217-219.

Of course, Congress enacted ERISA in 1974 and, therefore, its definitional provisions do not provide any direct insight into the intent of the framers who enacted

[3] [Continued]

29 U.S.C. § 1002(2)(A). The phrase "employee welfare benefit plan" includes:

> any plan, fund, or program . . . established or maintained . . . for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 186(c) of this title (other than pensions on retirement or death, and insurance to provide such pensions).

29 U.S.C. § 1002(1).

§ 4(f)(2) of the ADEA in 1967. But other legislation in existence at the time Congress enacted § 4(f)(2) provides the necessary evidence that the phrase "employee benefit plan" was also then understood broadly to cover all programs for providing non-wage, non-salary compensation. Specifically, nine years prior to the ADEA's enactment, Congress enacted the Welfare and Pension Plans Disclosure Act of 1958 ("WPPDA"), 29 U.S.C. §§ 301-309 (repealed), *reprinted in* 1958 U.S. Code Cong. & Admin. News, 72 Stat. 1172, which defined the phrase "employee benefit plan" to include all "employee pension benefit plan[s]" and "employee welfare benefit plan[s]". *See* 29 U.S.C. § 303. The WPPDA further provided that:

> The term "employee welfare benefit plan" means any plan, fund, or program . . . for the purpose of providing . . . through the purchase of insurance or otherwise, medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death, or unemployment.

29 U.S.C. § 303(a)(1). Numerous pre-ADEA laws enacted both before and after the WPPDA in 1958 similarly embodied this broad understanding of the phrase "employee benefit plan".[4] Accordingly, since Congress can

[4] *See, e.g.*, 29 U.S.C. § 207(e)(4) (Fail Labor Standards Act of 1939 specifies that, in calculating an employee's "regular rate" of wages, an employer should exclude employee benefits, including "contributions . . . for providing old-age, retirement, life, accident, or health insurance or similar benefits for employees"); 40 U.S.C. § 276a(b) (Davis-Bacon Act of 1931 defines "bona fide fringe benefits" to include plans or programs for the provision of medical or hospital care, pensions on retirement or death, compensation for injuries or illness, unemployment benefits, life insurance, disability and sickness insurance, accident insurance, vacation and holiday pay, and other bona fide fringe benefits); 41 U.S.C. §§ 351, 351(a)(2) (Service Contract Labor Standards Act of 1965 defines "fringe benefits" to include medical or hospital care, pensions on retirement or death, compensation for injuries or illness, unemployment benefits, life insurance, disability, sickness and accident insurance, vacation and holiday pay, costs of apprenticeship and other bona fide fringe benefits).

be presumed to use words in their ordinary legal sense, the phrase "any bona fide employee benefit plan" must be read as prima facie protection for the gamut of employee fringe benefit programs, including those without age-related cost justifications (such as disability retirement, severance, sick leave, and unemployment compensation plans). *See Lorillard v. Pons*, 434 U.S. 575, 585 (1978).

2. That the phrase "any bona fide employee benefit plan" was intended to cover all ongoing administrative programs that may vary non-payroll compensation items on the basis of age—including those without age-related cost justifications—does not mean that all such programs are lawful under the ADEA. Section 4(f)(2) withholds its protection from any bona fide employee benefit plan which is a "subterfuge to evade the purposes of [the ADEA]." 29 U.S.C. § 623(f)(2). But, as this Court held in *United Air Lines, Inc. v. McMann*, 434 U.S. at 203, the "subterfuge" language indicates only that Congress intended to prevent employers from using § 4(f)(2) to circumvent one of the statute's prohibitions. And, as explained above, § 4(f)(2) itself makes clear that the ADEA does not prohibit an employer from observing the terms of a plan that varies employee benefits on the basis of age. Thus, a "subterfuge" cannot be found simply because the employer creates or follows an employee benefit plan that varies benefits on the basis of age, or because the plan does not have an age-related cost justification.

Rather, a "subterfuge" may be found only where an employer has designed and used a plan specifically to discriminate against older workers with respect to either their terms and conditions of employment or their compensation that does not require and is not conferred through an employee benefit plan. That is, to be a "subterfuge," the plan must be specifically designed involuntarily to deprive older workers of terms and conditions of employment that younger persons enjoy—for example, a plan that is purposefully designed and used as a cover

for the involuntary retirement of older persons. *See Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 124-125 (1985); *Karlen v. City Colleges*, 837 F.2d 314, 319-320 (7th Cir.), *cert. denied sub nom. Cook County College Teachers Union, Local 1600 v. City Colleges of Chicago*, 108 S. Ct. 2038 (1988). Alternatively, the plan must be specifically conceived to evade the statutory prohibition against age discrimination in the payment of wages or benefits that do not require an ongoing administrative scheme—by, for example, using an employee benefit plan to continue what previously had been a discriminatory payroll practice. *Cf. EEOC v. Home Ins. Co.*, 672 F.2d 252, 257-263 (2d Cir. 1982). Without proof of an intent to evade a statutory prohibition unrelated to the payment of fringe benefits, however, the variance in benefits under the plan would constitute nothing more than the discrimination that § 4(f)(2) expressly permits.[5]

That the intent of a plan's designers must be to evade one of the statute's prohibitions means that, in certain circumstances, a "subterfuge" cannot possibly be found. First, as the DOL initially suggested in 1969, where benefits variances are justified by age-related costs, no "subterfuge" can exist; it would be unreasonable to find an intent to drive older employees from the workforce where an employer incurs equal costs on behalf of similarly-situated employees of different ages. *See* 29 C.F.R. § 860.120, 34 Fed. Reg. 9709 (June 21, 1969). Second, as this Court held in *United Air Lines, Inc. v. McMann*, 434 U.S. at 203, no "subterfuge" can be found where a discriminatory benefit provision pre-dates the enactment of the ADEA; no employer is so prescient that it could

[5] Even where an intent exists to induce older persons to leave the work force, the employer may be acting entirely lawfully and consistent with the purposes of the ADEA—as in the case of a voluntary retirement incentive program. *See Bodnar v. Synpol, Inc.*, 843 F.2d 190, 192 (5th Cir.), *cert. denied*, 57 U.S.L.W. 3280 (U.S. Oct. 18, 1988); *Henn v. National Geographic Soc'y*, 819 F.2d 824, 827 (7th Cir.), *cert. denied*, 108 S. Ct. 454 (1987).

have designed a plan to evade a statutory prohibition that was not yet in existence.[6] Finally, while there is no *per se* requirement that an age-based benefit distinction have an economic or business purpose, undisputed proof of such a purpose would dispel any possible inference of "subterfuge"; the specific intent necessary to deny the protection of § 4(f)(2)—i.e., a purpose to drive older persons from the workforce or to vary their wage or salary compensation on the basis of age—cannot be found where the undisputed evidence shows a non-arbitrary, business-related purpose for the distinction. *See, e.g., Potenze v. New York Shipping Ass'n*, 804 F.2d 235, 238-239 (2d Cir. 1986), *cert. denied*, 107 S. Ct. 1955 (1987); *Crosland v. Charlotte Eye, Ear and Throat Hosp.*, 686 F.2d 208, 212-216 (4th Cir. 1982).[7]

[6] To be sure, as Justice White argued in *McMann*, maintaining a plan (or readopting a discriminatory provision when making other changes to a plan) after the enactment of the ADEA requires a deliberate decision on an employer's part. *See* 434 U.S. at 207 (White, J., concurring). But, whether this point is valid or not, a majority of this Court rejected it at the time, and, until overruled by Congress, the majority's holding on the "subterfuge" issue is binding.

The court below suggested that (J.S. App. A4), in amending the ADEA in 1978, Congress overruled this aspect of the *McMann* decision. But Congress did not modify or redefine the "subterfuge" language in response to the *McMann* majority's rejection of Justice White's argument; it simply amended the statute to prohibit involuntary retirement. Moreover, as both Appellant and the Commonwealth of Pennsylvania as *amicus curiae* explain (App. Br. at 39-48; Penn. Br. at 20-21, 25-26), while the legislative history indicates that Congress disagreed with the result of the *McMann* decision, its focus was entirely on the lawfulness of involuntary retirement provisions; the application of the "subterfuge" clause to other plan provisions was simply not addressed. In these circumstances, Congress cannot be deemed to have overruled the *McMann* majority's interpretation of the "subterfuge" clause. *Accord EEOC v. Cargill, Inc.*, 855 F.2d 682, 686 (10th Cir. 1988); *EEOC v. County of Orange*, 837 F.2d 420, 422 (9th Cir. 1988).

[7] While an agreement arising from collective bargaining is not completely immune from ADEA challenge, *see EEOC v. County of*

Concomitantly, the "subterfuge" language cannot properly be used to import an age-related cost justification limitation into § 4(f)(2). "In ordinary parlance, and in dictionary definitions as well, a subterfuge is a scheme, plan, stratagem, or artifice of evasion." *United Air Lines, Inc. v. McMann*, 434 U.S. at 203. Thus, the "subterfuge" language must refer to a specific "intent . . . to evade a statutory requirement," and is inconsistent with any "*per se* rule requiring an employer to show an economic or business purpose" in order to qualify for the § 4(f)(2) exemption. *Ibid.* A *per se* age-related cost justification limitation is even more at odds with the "subterfuge" language than is a *per se* economic or business purpose requirement: by making the "subterfuge" inquiry turn on a particular kind of objective proof, it essentially removes the illicit subjective intent requirement from the statute. *Cf. Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). The "subterfuge" language cannot properly be interpreted in this fashion. *Accord EEOC v. City of Mt. Lebanon*, 842 F.2d 1480, 1494-1495 (3d Cir. 1988) (Hutchinson, J., concurring); *Germann v. Levy*, 553 F. Supp. 700, 703 n.9 (N.D. Ill. 1982).[8]

Calumet, 686 F.2d 1249, 1255-57 (7th Cir. 1982), bona fide collective bargaining negotiations do not lend themselves easily to unlawful collaboration and conspiracy. *See Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 79-83 (1977); *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68-71 (1982). Thus, courts should give "maximum deference" to collective bargaining agreements (*see, e.g., EEOC v. Fox Point-Bayside School Dist.*, 772 F.2d 1294, 1302-03 (7th Cir. 1985); *Graczyk v. United Steelworkers*, 763 F.2d 256, 262-63 (7th Cir.), *cert. denied*, 474 U.S. 970 (1985)), and should rarely, if ever, find that age-distinctions in collectively bargained benefit plans are a "subterfuge" to evade the ADEA. *Accord* Note, *Federal Age Discrimination in Employment Act: The Pension Plan Exception After McMann and the 1978 Amendments*, 54 Notre Dame L. Rev. 323, 329 (1980).

[8] The court below not only found (J.S. App. A4) that Congress had overruled the *McMann* Court's interpretation of the "subterfuge" clause in the 1978 ADEA amendments, it also apparently equated the "subterfuge," "economic or business purpose," and "age-related cost justification" inquiries. *See* J.S. App. A5-A6. As noted earlier, we agree with Appellant and the Commonwealth of Pennsylvania as *amicus curiae* that Congress did not overrule the *McMann* Court's interpretation of the "subterfuge" language. But, even if Congress in 1978 did overrule the "subterfuge" aspect of the *McMann* decision, the court below still erred in equating the "subterfuge," "economic or business purpose," and "age-related cost justification" inquiries.

As Justice White pointed out in his *McMann* concurrence, even if a pre-Act plan can be a "subterfuge," proof of a "business or economic purpose" is not necessary to establish the absence of a "subterfuge." 434 U.S. at 207. Rather, an employer need simply offer proof that its plan is not designed to circumvent one of the ADEA's prohibitions—such as the prohibition against discharges. While proof of a "business or economic purpose" for a benefit variance will plainly suffice, it is not required. We agree with Appellant (at 16-23) and the Commonwealth of Pennsylvania (at 26-28) that nothing in the 1978 statute or its legislative history is to the contrary.

Moreover, even if a "business or economic purpose" were required, it would be wrong to equate the "economic or business purpose" and "age-related cost justification" inquiries. An age-related cost justification is just one example of an "economic or business purpose." Nothing in the 1978 amendment or its legislative history purports to restrict the kinds of economic or business purposes that may be offered to justify an age-based plan distinction.

In this case, a "business or economic purpose" exists. As the district court found (J.S. App. A25-A26), when Appellant limited eligibility for disability retirement benefits to persons under age 60 and ineligible for other retirement benefits, it had a legitimate economic or business purpose for doing so—to wit, to provide benefits to persons who "otherwise have no source of income during their disability."

B. An Age-Related Cost Justification Limitation Is Inconsistent With The Legislative History Of And The Legislative Purpose For The § 4(f)(2) Exemption

An age-related cost justification limitation is also inconsistent with the legislative history of and the legislative purpose for the § 4(f)(2) exemption. Such a limitation fails to recognize Congress' other reasons for including § 4(f)(2), as amended, in the statute.

1. Congress first began considering the problem of age discrimination in employment in 1964. At that time, Congress ordered the Secretary of Labor to "make a full and complete study of the factors which might tend to result in discrimination in employment because of age and of the consequences of such discrimination on the economy and individuals affected," and to report back to Congress with recommendations for legislation to prevent "arbitrary" age discrimination in employment. 42 U.S.C. § 2000e-14 (repealed).

The Secretary of Labor did so. *See The Older American Worker: Age Discrimination in Employment, Report of the Secretary of Labor to the Congress Under Section 715 of the Civil Rights Act of 1964* (1965) (*"Secretary's Report"*), *reprinted in EEOC Legislative History of the Age Discrimination in Employment Act of 1967*, at 16-41 (1981) (*"EEOC Legislative History"*). His June 1965 Report began by emphasizing that "not all discrimination in this area is 'arbitrary'." *EEOC Legislative History*, at 19. It found that, in contrast to race discrimination, age discrimination is rarely based on a mere dislike for older workers. *Id.* at 20. Rather, it found that age discrimination is principally based on three other factors: (a) unfounded assumptions about the effect of age on ability to perform; (b) valid conclusions about the effect of age on ability to do a job; and (c) institutional arrangements—such as pension, seniority, insurance, and promotion from-within-policies —that, although often designed to protect or support older workers, may have an adverse impact on their employment opportunities. *Ibid.* Importantly, the Report made clear that only decision making based on unfounded assumptions about the effect of age on ability constitutes "arbitrary age discrimination," although the Report added that, in isolated circumstances, institutional arrangements could be used arbitrarily to restrict the employment opportunities of older workers. *Id.* at 20, 22.

As noted, the Report expressly characterized employee benefit plans as "institutional arrangements" which might adversely affect the employment of older workers. *EEOC Legislative History*, at 33. But, importantly, it also stressed that "[i]t is not clear to what extent [exclusions of older workers from the workforce] arise directly from cost factors and to what extent they are the result of plan operations largely unrelated to costs." *Ibid.* It found that "cost considerations do not . . . always operate against the older worker," that "[r]elatively few employers, in fact, cited the costs of providing pension and insurance benefits as significant barriers to employment of older persons," and that, "[e]ven in cases where [employers] mentioned pension and insurance [plans as a barrier to employment], cost was not the principal factor involved." *Ibid.*[9] Rather, the Report noted that employers had cited limited work expectancy of older workers, morale issues associated with employing persons who would not qualify for employee benefits, and presumed inability to pass physical examinations as the principal employee benefit plan-related barriers to the full employment of older workers. *Id.* at 33-34. The Report concluded that "[c]ase-by-case examination is necessary" to determine which benefit "plan-induced limitations on employment can be considered to constitute arbitrary discrimination[.]" *Id.* at 34.

2. Following the issuance of the Secretary's Report, a group of Senators proposed, in 1966, to amend the Fair Labor Standards Act ("FLSA") to prohibit age discrimination in "terms, conditions, or privileges" of employment, unless age was a necessary bona fide occupational

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[9] The *Research Materials Accompanying The Secretary of Labor's Report* 10 (1965) indicated that, of the employers surveyed, only 6.7% cited the costs and provisions of pension plans as a reason for excluding older workers; only 1.4% cited the costs and provisions of health insurance as a reason; and only 1.2% cited the costs and provisions of life insurance as a factor.

qualification. *See EEOC Legislative History*, at 43. While Congress did not enact this proposal (*see id.* at 47), it did direct the Secretary of Labor to submit specific legislative proposals to implement the recommendations that he made in his Report. *See* Fair Labor Standards Act Amendments of 1966, P.L. No. 89-601, 80 Stat. 830.

On January 23, 1967, the Secretary did so. After President Johnson issued a message to the Congress stating that "[w]e must end arbitrary age limits on hiring" (*A Review of Measures Taken to Aid the Older Americans and Recommendations for Legislation to Provide Further Aid*, 113 Cong. Rec. 1089-90, 90th Cong., 1st Sess. (1967), *reprinted in EEOC Legislative History*, at 60-61), Secretary of Labor Willard Wirtz submitted a draft "Age Discrimination in Employment Act of 1967" to Congress. *See id.* at 62-63. In his cover letter, Secretary Wirtz stated that the bill's "prohibitions are designed to bar arbitrary age discrimination." *Id.* at 62. With respect to so-called "institutional arrangements," the Secretary stated that the bill authorized research that would be aimed at "reducing barriers to the employment of older workers." *Id.* at 63. Section 4(f) of the bill, however, also provided that:

> It shall not be unlawful for an employer, employment agency, or labor organization—
>
> (2) to separate involuntarily an employee under a retirement policy or system where such policy or system is not merely a subterfuge to evade the purposes of this Act[.]

113 Cong. Rec. 2794 (Feb. 7, 1967), *reprinted in EEOC Legislative History*, at 68.

The Senate Hearings on this bill, which Senator Yarborough introduced as S. 830 on February 3, 1967 (*EEOC Legislative History*, at 66), commenced on March 15, 1967. *See Age Discrimination in Employment: Hearings on S.830 and S.788 Before the Subcommittee on*

Labor of the Senate Committee on Labor and Public Welfare, 90th Cong., 1st Sess. (March 15-17, 1967) ("*Senate Hearings*"). On the first day of these hearings, Senator Javits, who had previously introduced his own age discrimination bill, S. 788, criticized § 4(f)(2) of the Administration bill on the ground that:

> the age discrimination law should not be used as the place to fight the pension battle but that we ought to subordinate the importance of adequate pension benefits for older workers in favor of the employment of such older workers and not make the equal treatment under pension plans a condition of that employment.

Senate Hearings, at 27. Senator Javits announced that he would therefore soon propose an amendment to the Administration bill that would grant employers "a degree of flexibility" with respect to employee benefit plans. *Ibid.* In his view, a "fairly broad exemption . . . for bona fide retirement and seniority systems [would] facilitate hiring rather than deter it and make it possible for older workers to be employed without the necessity of disrupting those systems." *Id.* at 28.

Senator Smathers, a co-sponsor of S. 830, similarly indicated on this first day of the hearings that a "deficiency" existed in the Administration's bill. *Senate Hearings*, at 29. Senator Smathers read the Administration's bill as requiring employers to provide older workers "the same private pension rights and other fringe benefits" as they provide to younger workers. *Ibid.* Senator Smathers argued that such a requirement would impose unwarranted costs on employers and actually induce them to discriminate against older workers in the hiring process. *Id.* at 29-30. He therefore proposed the following amendment:

> (g) Nothing in this Act shall be construed to make unlawful the varying of coverage under any pension, retirement, or insurance plan or any plan for pro-

> viding medical or hospital benefits or benefits for work injuries, where such variance is necessary to prevent the employer's being required to pay more for coverage of an employee than would be required to provide like coverage for his other employees.

Id. at 30. Senator Smathers suggested that this amendment, by equalizing the employer's cost obligations, would make the bill fairer to the employer and reduce the perverse hiring incentives with which he was concerned. *Ibid.*

Senator Murphy next urged the committee, however, to reconsider the bill that he and Senator Javits had introduced in 1966. *Senate Hearings*, at 32. In doing so, Senator Murphy reiterated the Secretary of Labor's finding that, in his studies, only a small percentage of employers cited the cost of providing pension and insurance benefits as a reason for age discrimination in employment. *Id.* at 34. Moreover, he referred the committee to a Bureau of Labor Statistics ("BLS") report which purported to show that the costs of health and insurance plans do not vary greatly with age and that pension and insurance costs of hiring older workers are often overstated. *Ibid.*

Secretary Wirtz then took the podium in defense of the Administration's bill. *Senate Hearings*, at 33. He emphasized that the Administration bill's "prohibition is of 'discrimination' in the sense of '*arbitrary* age discrimination.' This is reflected particularly in Section 4(f)," which he characterized as "obviously broad." *Id.* at 39 (emphasis in original). Secretary Wirtz stated that § 4(a)'s prohibition on age discrimination "reflects simply the significant fact that what we are doing here is to extend to individuals in situations not covered by collective bargaining agreements or established retirement policies, a degree of protection against discrimination on the basis of age. . . ." *Id.* at 43. He noted, however, that, under §§ 4(a) and (f) of the Administration bill,

"[w]hether different eligibility requirements or benefit levels for older workers would constitute arbitrary discrimination . . . would require determination under the facts of each case." *Id.* at 47. But, in response to questions, he opined that "the effect of the provisions in section 4(f)(2) . . . is to protect the application of almost all plans which I know anything about." *Id.* at 53.

3. Senator Javits was apparently not persuaded by Secretary Wirtz's reassurances about the effect of § 4(f)(2) of the Administration bill. The next day, on the Senate floor; he reiterated his concern that the Administration's bill was inflexible and that it would encourage, rather than discourage, age discrimination in employment. *See* 113 Cong. Rec. 7076 (March 16, 1967), *reprinted in EEOC Legislative History*, at 71. He thus proposed that § 4(f)(2) of the Administration bill be replaced with an amendment making it lawful for an employer:

> (2) to observe a seniority system or any retirement, pension, employee benefit, or insurance plan, which is not merely a subterfuge to evade the purposes of this Act, except that no such retirement, pension, employee benefit, or insurance plan shall excuse the failure to hire any individual[.]

113 Cong. Rec. 7077 (March 16, 1967), *reprinted in EEOC Legislative History*, at 72.

Senator Javits stressed that he did not mean to minimize the importance of older workers receiving adequate pension benefits and the like. 113 Cong. Rec. 7076 (March 16, 1967), *reprinted in EEOC Legislative History*, at 71. But he stated that, in his view, "the age discrimination law is not the proper place to fight this particular battle." *Ibid.* Indeed, he noted that he had "recently introduced a comprehensive bill to deal with this problem." *Ibid.* Significantly, the bill to which he referred, which was a precursor to ERISA, defined the phrase "employee benefit plan" to include:

> any plan providing for the payment of any of . . . the following benefits: Medical or hospital care, pension on retirement or death of employees, benefits under a profit-sharing retirement plan, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness benefits, or accident benefits, or pooled vacation, holiday, severance or similar benefits, or defraying the costs of apprenticeship training programs, or, in the case of a fund subject to the restrictions of section 302(c) of the Labor-Management Relations Act, providing any other benefit which may be permitted by subsections 302(c)(5) or 302(c)(6) of that Act[.]

S. 1103, 90th Cong., 1st Sess. 2-3 (1967).[10]

4. The hearings in the House evidence a clear understanding on that body's part of the events that occurred in the Senate subcommittee. *See Age Discrimination in Employment: Hearings on H.R. 3651, H.R. 3768, and H.R. 4221 Before the General Subcommittee on Labor*

[10] When the hearings resumed, representatives of the business community joined with Senator Javits in urging the committee to adopt a broader exception for bona fide employee benefit plans than the Administration bill provided. Like Senator Javits, Towers, Perrin, Forrester & Crosby, Inc., a leading employee benefits consulting firm, recommended that the Administration bill be amended to exempt "any other bona fide employee benefit plan" from the statute's operation, stating that, "[i]n the absence of such exclusions, . . . hundreds of long established, bona fide pension, group life insurance, medical and other employee benefit plans may be in violation of section 4(a)(1)[.]" *Senate Hearings*, at 280. The American Life Convention, the Health Insurance Association of America, and the Life Insurance Association of America similarly expressed concern that the Administration's bill would disrupt many established insurance, welfare, pension, and other employee benefit plans. *Id.* at 296. And the National Association of Manufacturers argued that any regulation of employee benefit plans "should be accomplished knowingly and intelligently, not inadvertently by legislation designed to resolve an entirely different matter." *Id.* at 323.

of the House Committee on Education and Labor, 90th Cong., 1st Sess. (August 1, 2, 3, 15, 16 and 17, 1967) ("*House Hearings*"). Secretary Wirtz admitted to the House subcommittee that the Senate subcommittee had amended § 4(f)(2) of the Administration bill in order to clarify its scope. *House Hearings*, at 39-40. Numerous witnesses urged the House subcommittee to do so too, reiterating the concerns expressed in the Senate that the Administration bill would disrupt existing plans and discourage the hiring of older workers. *See id.* at 63, 68-70, 413, 418, 480-481, 495-496, 496-497, 499-500. In doing so, they proposed language like that Senator Javits proposed in the Senate and that is essentially identical to the language ultimately enacted. *See id.* at 63, 480-481, 496, 499. And, as the Chairman of the House subcommittee explained, the proposed language would "relieve[] [employers] of the responsibility for the health and welfare and fringe benefits to employees" covered by the bill. *Id.* at 68 (remarks of Rep. Dent).

On October 23, 1967, after the conclusion of these hearings, the Committee on Education and Labor reported H.R. 13054 favorably to the House as a whole. *See* H.R. Rep. No. 805, 90th Cong., 1st Sess. 4, *reprinted in EEOC Legislative History*, at 77. The bill so reported included the amendment proposed by the witnesses in the House hearings. *See id.* at 94. In discussing the amended § 4(f)(2), the House Committee's report stated:

> It is important to note that exception [2] applies to new and existing employee benefit plans, and to both the establishment and maintenance of such plans. This exception serves to emphasize the primary purpose of the bill—hiring of older workers—by permitting employment without necessarily including such workers in employee benefit plans. The specific exception was an amendment to the original

bill, is considered vita[l] to the legislation, and was favorably received by witnesses at the hearings.

H.R. Rep. No. 805, *supra*, *reprinted in EEOC Legislative History*, at 77. Twelve days later, the same bill was reported favorably to the Senate, with a Senate committee report to the same effect. *See* S. Rep. No. 723, 90th Cong., 1st Sess. 4 (November 4, 1967), *reprinted in EEOC Legislative History*, at 108.[11]

In floor debate before the Senate, on November 6, 1967, Senator Javits engaged Senator Yarborough, the floor manager of the bill, in the following colloquy to make certain that the full effect of his amendment was understood:

> MR. JAVITS: The meaning of this provision is as follows: *An employer will not be compelled . . . to afford to older workers exactly the same pension, retirement, or insurance benefits as he affords to younger workers. If the older worker chooses to waive all of those provisions, then the older worker can obtain the benefits of this act*, but the older worker cannot compel an employer through the use of this act to undertake some special relationship, course, or other condition with respect to a retirement, pension, or insurance plan which is not merely a subterfuge to evade the purposes of the act—and we understand that—in order to give that older employee employment on the same terms as others.

[11] Senator Javits, in his Individual Views accompanying S. Rep. No. 723, *supra*, stated that:

> the bill has also been improved by the adoption of language . . . exempting . . . bona fide seniority systems and retirement, pension, or other employee benefit plans from its prohibitions. The lack of any such provision was a serious defect in both S. 788 and S. 830 as originally introduced, since in its absence employers might actually have been discouraged from hiring older workers because of the increased costs involved in providing certain types of benefits to them.

Id. at 14, *reprinted in EEOC Legislative History*, at 118.

I would like to ask the manager of the bill whether he agrees with that interpretation, because I think it is very necessary to make its meaning clear to both employers and employees. . . .

MR. YARBOROUGH: I wish to say to the Senator that that is basically my understanding of the provision . . . *[I]t means that a man who would not have been employed except for this law does not have to receive the benefits of the plan.* Say an applicant for employment is 55, comes in and seeks employment, and the company has bargained for a plan with its labor union that provides that certain moneys will be put up for a pension plan for anyone who worked for the employer for 20 years so that a 55-year-old employee would not be employed past 10 years. This means he cannot be denied employment because he is 55, but he will not be able to participate in that pension plan because unlike a man hired at 44, he has no chance to earn 20 years retirement. *In other words, this will not disrupt the bargained-for pension plan. This will not deny an individual employment or prospective employment but will limit his rights to obtain full consideration in the pension, retirement, or insurance plan.*

MR. JAVITS: I thank my colleague. That is important to business people.

113 Cong. Rec. 31255, *reprinted in EEOC Legislative History*, at 146 (emphasis added).

The floor debate in the House indicates that the members of this branch of Congress similarly understood that § 4(f)(2), as amended, would broadly protect employee benefit plans, even where the plans completely excluded older workers. Representative Perkins, the floor manager of the House bill, H.R. 13054, stated quite explicitly that "[w]e do not undertake to tackle the whole problem of age discrimination in employment in this bill, but we feel that we strike at the heart of the situation"; and he specifically noted that "[e]xceptions are provided in order

not to disrupt employee benefit programs, seniority systems, and the like." 113 Cong. Rec. 34740 (Dec. 4, 1967), *reprinted in EEOC Legislative History*, at 151. Representative Randall, speaking in support of the bill, likewise noted that the amended bill left some things undone: ". . . there is no provision for a worker, in the 40 to 65 range, to participate in some of the pension or retirement programs available to his fellow workers." 113 Cong. Rec. 34750 (Dec. 4, 1967), *reprinted in EEOC Legislative History*, at 161. Some members of the House even opposed the bill precisely because it allowed older workers to be excluded entirely from existing benefit plans and thus allowed employers to reap a "cash reward." 113 Cong. Rec. 34745 (Dec. 4, 1967), *reprinted in EEOC Legislative History*, at 156. But the amended bill, with that provision and understanding, was nevertheless passed by the House (and the Senate) and eventually signed by the President into law.

5. This legislative history confirms that, in enacting the critical language in § 4(f)(2), Congress understood that it was exempting myriad fringe benefit plans and that the exemption would not be limited to benefit variances justified by age-related costs. Congress was principally concerned with promoting the employment of older workers. It understood that employee benefit plans were among the "institutional barriers" to the employment of older workers. But it had no reason to believe that the age-related costs of providing such benefits were the only employee benefit plan-related cause of the unemployment problem. To the contrary, the Secretary's studies, of which Congress was plainly aware, had suggested that limited work expectancy, morale issues associated with employing persons who would not qualify for benefits, and presumed inability to pass physical examinations were even greater employee benefit plan-related barriers to the employment of older persons than were the increased costs (if any) of providing such benefits to them.

Congress acted on this larger and more subtle understanding of the age discrimination in employment problem when it enacted the existing version of § 4(f)(2). It expressly declined to adopt Senator Smathers' proposal, which would have limited the exemption to benefit variances justified by age-related costs. Likewise, it declined to adopt the Administration bill, which Secretary Wirtz had suggested would allow case-by-case inquiry into the issue of whether different eligibility requirements or benefit levels for older workers constituted "arbitrary" age discrimination in employment. Instead, it adopted Senator Javits' proposal in order, as Senator Javits stated, to grant employers "a degree of flexibility" with respect to employee benefit plans and thereby to "facilitate hiring rather than deter it and [to] make it possible for older workers to be employed without the necessity of disrupting those systems." *Senate Hearings*, at 27-28.

An age-related cost justification limitation on § 4(f)(2) is simply irreconcilable with this legislative history. It ignores Congress' failure to adopt Senator Smathers' proposal for an express age-related cost justification limitation. It authorizes case-by-case scrutiny of individual terms of employee benefit plans, even though Congress dismissed such an approach when it declined to adopt the Administration's proposal. It fails to acknowledge that employee benefit plan-related barriers to the full employment of older workers extend beyond age-related benefit costs and thus does not fully respond to the institutional concerns which Congress had found resulted in the unemployment of older persons. And it suggests that myriad employee benefit plans, many of which pre-dated the statute's enactment, are unlawful and must be changed, notwithstanding Congress' clear intent to prevent the disruption of employee benefit plans and to leave their regulation to a more studied and comprehensive statutory scheme (like the one Senator Javits had con-

temporaneously proposed).[12] Such inconsistencies with legislative history and purpose confirm that the age-related cost justification limitation is statutorily unreasonable.

CONCLUSION

For the reasons set forth above, the judgment of the court below should be reversed.

Respectfully submitted,

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[12] For example, the age-related cost justification theory would disrupt numerous disability retirement plans. As the Commonwealth of Pennsylvania makes clear in its brief, over half of the states in this country limit disability retirement benefits to persons ineligible for regular or early retirement benefits. Surveys indicate that the majority of private plans similarly limit eligibility for disability retirement benefits. *See Basic Patterns: Collective Bargaining Negotiations and Contracts* (BNA) No. 1068, at 48:2 (May 8, 1986).

The disruption would, of course, extend to other kinds of employee benefit plans as well. Some courts have held that the cost of providing severance pay does not vary with age and, moreover, that denying severafice pay on the basis of pension or retirement eligibility discriminates against the older worker. *EEOC v. Westinghouse Elec. Corp., supra.* But surveys show that, both in 1967 and today, large numbers of severance pay plans condition their benefits on ineligibility for pensions. *See Major Collective Bargaining Agreements: Severance Pay and Layoff Benefit Plans*, U.S. Dept. of Labor, Bulletin No. 1425-2 (1965), at 23; *Basic Pattern: Income Maintenance, Collective Bargaining Negotiations and Contracts* (BNA) No. 1067, at 43:4 (Apr. 24, 1986). There is nothing in the statute or the legisiative history to suggest that Congress intended the wholesale invalidation of these severance pay plans.